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SUBJECT: PROSECUTING RAPE CASES IN SOUTH CHINA'S CRIMINAL COURTS -
AN IMPERFECT SYSTEM

11. (SBU) Summary: As Guangzhou's American Citizen Services Section continues to closely monitor the status of a criminal case in which an American citizen has been charged with rape, research into how the local courts handle the prosecution of these cases sheds some light on China's developing criminal justice system. Severe penalties are authorized by statute, including the death penalty, though the latter seems to be used less frequently than before. Although some institutional parallels with the U.S. system might be emerging, there remain few dependable safeguards to protect the rights of the accused. One extraordinary contrast with the U.S. system: the prosecution has the ability to appeal a not guilty finding by a trial court, and can request the review of a sentence viewed as insufficiently punitive. End summary.

On Paper, Clear Penalties and Institutional Structure

12. (U) First: How does the law define rape? Rape, and the less-severe crime of sexual assault, are considered serious crimes according to the current Chinese Criminal Law, first promulgated in 1979 and then revised in 1997. While not defining the act of rape explicitly, Chinese criminal law stipulates that raping a person "by violence, coercion, or any other means" is punishable with "a fixed term imprisonment of not less than three years but no more than ten years." The statute on rape also stipulates that having sexual intercourse with a girl under the age of 14 shall be deemed rape and that the perpetrator shall receive a more severe punishment. Aggravating circumstances, such as multiple victims, rape in public, gang rape, or causing the victim serious injury or death, increase the statutory penalty to a "fixed term imprisonment of not less than ten years, life imprisonment, or death."

13. (U) While Chinese criminal law does not use the term "sexual assault", Chinese law stipulates that "an indecent act or the insulting of a woman by violence, coercion, or other forcible means" is a violent crime. Penalties of up to five years imprisonment are authorized, but aggravating circumstances, such as the incident occurring in public, can increase the statutory minimum imprisonment to five years. If the victim is a child under age 14, penalties will fall at the higher end of the sentencing limits. Chinese criminal law also considers participating in "promiscuous or licentious group activities" a public order crime, which can result in a sentence of public surveillance (a rough equivalent to probation in Western courts), detention time, or imprisonment of less than five years.

Jurisdiction

14. (U) Second: Who has jurisdiction? The Chinese criminal court system consists of four distinct levels: County (or District), City (Intermediate), Provincial, and Supreme Court. A typical trial is held before a three-judge panel, though provincial courts and the

Supreme Court may use a maximum of seven judges to decide a given case. In a county court, if the case is minor, the proceedings can be presided over by a single judge. Jury trials for criminal cases do not exist. Most criminal cases are initiated in a county or city court, but cases of unusual complexity or notoriety can be filed at the level of the Provincial People's Court. A criminal case can be appealed no more than one level (for example, from the county to the provincial court); the appellate judgment is final and will be effective immediately after the verdict is announced. As in the United States, the Supreme Court has discretion to refuse to hear a criminal case on review.

Role of Prosecutor and Judge

15. (SBU) Similar to the U.S. legal system, the investigating arm of law enforcement - in China, normally the People's Security Bureau (PSB) - works in tandem with the prosecutor's office, known as the Procuratorate, forwarding completed investigations for review of potential charges. Deng Guanming, Judicial Liaison Officer for the Guangxi Zhuang Autonomous Region People's Procuratorate, advised that prosecutors must bring charges to court within one and half months of receiving a case from the PSB, and can return it to the law enforcement agency no more than twice for further investigation.

Plea bargaining - the mechanism used by American courts to resolve the vast majority of filed criminal cases - is not utilized in Chinese courts. Prosecutors and defense attorneys do not negotiate potential case dispositions in order to avoid trial. Although the Procuratorate files specific criminal charges, a judge has broad authority to amend charges brought against an individual, reducing or increasing the severity of charges filed by the prosecutor; the substitution of unique separate charges appears to be entirely

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within a court's discretion.

Role of Defense Lawyers

16. (SBU) Third: What are the rights of the accused? Access to legal counsel can be haphazard, often subject to the good will of the local defense bar. According to Professor Xu Songlin of Guangzhou's South China University of Technology, if a person taken into custody by the police cannot afford to hire an attorney, a judge will then seek to secure an attorney drawn from local defense firms, though the availability of counsel is not guaranteed (except in cases, according to Professor Xu, where the defendant faces the death penalty, has vision, hearing, or speech disabilities, or is a minor). Guangdong Province's Justice Department operates a Legal Assistance Center with several public defenders on staff, but they are often shorthanded. If a public defender is not available, a request must then go out to local law firms, but the court cannot appoint counsel, only ask for their help. Like their American counterparts, the role of the Chinese defense lawyer is to defend the actions of the defendant, but many observers view Chinese lawyers as too inexperienced and uncommitted to cases for which they are appointed. (Comment: From an American perspective, Chinese lawyers do not appear to share as strong a sense of duty and loyalty to their clients compared to their American lawyer counterparts. In China, the lawyer's first loyalty is to society, not the client, whereas Americans believe lawyers serve society best by fulfilling their duty to their clients. End comment.) Many Americans have said the lack of substantive assistance from their attorney was extremely frustrating.

17. (SBU) In Post's experience, a case does not go to trial unless the prosecutors believe they have enough evidence to convict the defendant. Post knows of only one case where a defendant was found not guilty and released at the end of a trial and in that case, the exonerated individual's co-defendant was sentenced to death with a later reduction to a life sentence. In addition, Post has noted a few cases where Chinese authorities have held individuals for more than a year and subsequently released them due to a lack of evidence.

Trial procedures

¶18. (SBU) Fourth: Where is the defendant in all of this? At trial, the defendant is unlikely to have the opportunity to confront his accuser. Criminal trials are typically short affairs, sometimes concluding in less than half an hour, with even the most complicated proceedings rarely taking more than two days. Shenzhen Procuratorate attorney Chen Xiang Wen (a prosecutor with over 12 years experience in the criminal courts) indicated that the court does not require an appearance by the victim in a criminal trial - video, as well as written statements, are often accepted as substantive evidence of guilt. Neither side enjoys subpoena power - the tool used by American attorneys to compel the presence of key witnesses, and one enforced through the ability of a judge to find an individual in contempt of court. Prosecutors must persuade a victim to come to court if deemed necessary for a case to remain viable. In addition, a judge may suspend a criminal proceeding and instruct a prosecutor to communicate to victims the need for them to appear in court, but beyond that measure, the system appears to rely on the victim's willingness to cooperate.

¶19. (SBU) Trial courts are permitted up to one and a half months to reach a decision in a criminal case (two and a half months for more complicated cases). Upon conviction for rape or sexual assault, a defendant's sentence is determined by the above-mentioned Chinese Criminal Law. Although the death penalty continues to be imposed for aggravated rape cases in Guangdong province, the Shenzhen Procuratorate maintains that courts impose the death sentence less frequently than in the past. The prosecutor's role at sentencing is typically limited to general recommendations to the court, noting relevant aggravating circumstances to be taken into consideration by the judge(s). Professor Xu noted a pilot program currently used by the municipal courts for rape cases in Dongguan that seeks to reconcile the offender and a victim and can result in a more lenient sentence.

Review of Cases

¶10. (SBU) Fifth: Discretion? Review? Though an appellate system exists in the Chinese criminal court system, the Shenzhen Procuratorate commented that the permissible basis for an appeal is not clear, and that the law in this area is quite vague. Time

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deadlines are strict, however - an appeal must be filed within ten calendar days of the delivery of a verdict. Discretion given to a reviewing court is quite extensive - appellate judges are not limited to the record created at the trial court level, as in U.S. courts. A reviewing court can seek to create a new evidentiary record (even hold an entirely new trial), review previous proceedings, modify findings and sentences, or simply send a case back to the trial level with instructions. In an extraordinary contrast with the American system, the prosecution has the ability to appeal a not guilty finding by a trial court, and also can request the review of a sentence viewed as insufficiently punitive. If a defendant chooses to appeal, the reviewing court cannot increase a sentence if the conviction is permitted to stand. However, a concurrent appeal by the Procuratorate will leave all options open to the reviewing court, including a more severe sentence than what was ordered at the trial court level.

¶11. (SBU) Once a convicted person goes to prison, a system similar to parole can impact how much prison time is actually served by an inmate. Common practice in the Chinese prison system is that a convict will serve at least one half of his or her sentence and then be considered for early release. In the case of a life term, this can occur as early as ten years into a sentence. As in the United States, an inmate's behavior while in prison is normally taken into account in making this determination. Sentences handed down in Chinese courts for rape and sexual assault share little of the complexity that can mark the punishment for these crimes in the United States, such as sex offender treatment, indeterminate prison terms, and mandatory lifetime registration. It has been Post's experience, however, that foreigners are seldom allowed early release because it is thought they will try to leave the country.

When foreign prisoners are finally released, they are almost always deported and not allowed to return to China for significant (but often undefined) periods of time - even if the offenders were originally Chinese citizens who had returned and settled in China after gaining foreign citizenship.

The Victim: Often Meager Resources to Help

¶12. (U) Although the Chinese criminal law finds aggravating circumstances - with mandatory elevated penalties - if the victim is seriously injured or killed, services available to a rape victim remain quite basic. Hospital staff at both the First Affiliated Hospital of Zhongshan University (one of the highest volume health care providers in the city and generally considered one of, if not the, best in the city), and the Qiao Yi Yuan community hospital indicated that if a woman came to their hospital and reported a rape, medical care would be provided, but the police would not be contacted barring an explicit request by the victim. "Rape kits" - specific investigatory packets used regularly by U.S. law enforcement - are apparently not available in the region. Large hospitals will occasionally have counselors available to assist with the psychological needs of sexual assault victims, but the availability of qualified professionals is generally quite limited. Other counseling services are also limited and most rape victims are too embarrassed and worried about public censure to ever admit or even tell anyone that they were raped.

¶13. (U) Unlike the U.S. criminal procedure system, in China, the victim is considered a party to the trial, and the victim or her legal counsel can make statements and question the defendant or a witness before the judge. As previously mentioned, however, uncooperative or unwilling victims cannot be compelled to appear in court. Victim participation in the prosecution of perpetrators is viewed as a duty which, if necessary, can be encouraged but not required. If a victim is unsatisfied with the result of a court proceeding (either by a finding of not guilty or a lack of severity in a convicted individual's sentence), the victim may request an appeal through the office of the Procuratorate. However, discretion remains within the hands of prosecutors as to whether to seek a review, and prosecutors and courts rarely consult victims on sentencing issues.

Foreigners Charged with Rape - An Equal Standard?

¶14. (SBU) Guangdong and Guangxi province prosecutors uniformly maintain that foreigners accused of rape are treated on the same basis as Chinese citizens. However, cases involving foreigners must be initiated at the Intermediate (City) level or higher. The Shenzhen Procuratorate also requires experienced municipal level prosecutors when a case involves a foreign defendant. Post is currently monitoring the case of an American charged with rape and coercive obscenity by Shenzhen authorities. The American was

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detained on December 13, 2007, formally arrested on December 27, and judges heard evidence in late March and early April. Six months to the day after his criminal detention, the Shenzhen Intermediate People's Court sentenced him to a fixed term of two years for rape and a fixed term of three years for coercive obscenity. The Court determined the total term of sentence to be four years, which will be calculated from the date of detention. It is encouraging to note from reading the judgment provided by the court that the lawyer the American hired tried to defend him in court. The defense that the accused was drunk at the time of the attack and that the woman had not appeared to him to resist his advances was deemed "insufficiently established" and not accepted by the court. This case was also unusual because the victim testified at the trial, as did the defendant and several witnesses. The American citizen plans to appeal his sentence.

¶15. (U) Beijing Embassy POL has cleared this cable.

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